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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 MITCHEL R. CALLEY,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 14-cv-05772 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
19 Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States
20 Magistrate Judge, Dkt. 7). This matter has been fully briefed (*see* Dkts. 14, 15, 16).

21 After considering and reviewing the record, the Court concludes that the ALJ
22 erred in discounting plaintiff's credibility without providing any clear and convincing
23 reasons supported by substantial evidence. Because the residual functional capacity
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1 (“RFC”) should have included additional limitations, and because these additional
2 limitations may have affected the ultimate disability determination, the error is not
3 harmless.

4 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
5 U.S.C. § 405(g) to the Acting Commissioner for further consideration.

6 BACKGROUND

7 Plaintiff, MITCHEL R. CALLEY, was born in 1960 and was 51 years old on the
8 alleged date of disability onset of January 15, 2011 (*see* AR. 164-67, 168-73). Plaintiff
9 completed high school (AR. 33). Plaintiff has work experience as a concrete finisher and
10 interior demolish person (AR. 34).

11 According to the ALJ, plaintiff has at least the severe impairments of “chronic
12 thrombocytopenia (low blood platelet count); osteoarthritis; peripheral neuropathy; and a
13 history of alcohol abuse in early remission (20 CFR 404.1520(c) and 416.920(c))” (AR.
14 17).

15 At the time of the hearing, plaintiff was living on the streets, using a homeless
16 shelter as his address (AR. 32).

17 PROCEDURAL HISTORY

18 Plaintiff’s applications for disability insurance (“DIB”) benefits pursuant to 42
19 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
20 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and
21 following reconsideration (*see* AR. 61-69, 71-79, 81-90, 92-101). Plaintiff’s requested
22 hearing was held before Administrative Law Judge Rudolph M. Murgo (“the ALJ”) on
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1 April 16, 2013 (*see* AR. 28-59). On April 24, 2013, the ALJ issued a written decision in
2 which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security
3 Act (*see* AR. 12-27).

4 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or
5 not the ALJ properly evaluated the medical evidence; (2) Whether or not the ALJ
6 properly evaluated plaintiff's testimony; (3) Whether or not the ALJ properly assessed
7 plaintiff's RFC; (4) Whether or not the ALJ erred by basing his step five finding on a
8 RFC assessment that did not include all of plaintiff's limitations; (5) Whether or not the
9 ALJ erred by relying upon vocational expert testimony that deviated from the *Dictionary*
10 *of Occupational Titles (DOT)*; and (6) Whether or not the Commissioner erred by failing
11 to include in the court transcript all of the medical records plaintiff submitted to the
12 Appeals Council (*see* Dkt. 14, p. 1). Because this Court reverses and remands the case
13 based on issues 2, 3, and 4, the Court need not further review other issues and expects the
14 ALJ to reevaluate the record as a whole in light of the direction provided below.

15 STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
17 denial of social security benefits if the ALJ's findings are based on legal error or not
18 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
19 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
20 1999)).
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DISCUSSION

(1) **Whether or not the ALJ properly evaluated plaintiff's testimony.**

Plaintiff contends that the ALJ erred by failing to give legally sufficient reasons for finding plaintiff not to be credible (*see* Opening Brief, Dkt. 14, pp. 7-11). The ALJ found that plaintiff's statements concerning the intensity, persistence, and limiting effects of his symptoms were not entirely credible for several reasons (*see* AR. 19-21). First, the ALJ found that plaintiff's allegations were not fully supported by objective evidence (AR. 19). Also, the ALJ found that plaintiff's limited medical treatment did not support his allegations (*id.*). Next, the ALJ found that plaintiff's allegations were inconsistent with his testimony at the hearing (AR. 20). Finally, the ALJ found that plaintiff's daily activities were inconsistent with his allegations of disabling impairment (AR. 21).

The ALJ's credibility determinations "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (*citing Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*)). In evaluating a claimant's credibility, the ALJ cannot rely on general findings, but "must specifically identify what testimony is credible and what evidence undermines the claimant's complaints." *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (*quoting Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)); *Reddick, supra*, 157 F.3d at 722 (citations omitted); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (citation omitted). According to the Ninth Circuit, "we may not take a general finding-an unspecified conflict between Claimant's testimony about daily activities and her reports to doctors-

1 and comb the administrative record to find specific conflicts.” *Burrell v. Colvin*, 775 F.3d
2 1133, 1138 (9th Cir. 2014).

3 The determination of whether or not to accept a claimant’s testimony regarding
4 subjective symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929;
5 *Smolen, supra*, 80 F.3d at 1281-82 (citing *Cotton v. Bowen*, 799 F.2d 1407-08 (9th Cir.
6 1986)). First, the ALJ must determine whether or not there is a medically determinable
7 impairment that reasonably could be expected to cause the claimant’s symptoms. 20
8 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen, supra*, 80 F.3d at 1281-82. If an ALJ rejects
9 the testimony of a claimant once an underlying impairment has been established, the ALJ
10 must support the rejection “by offering specific, clear and convincing reasons for doing
11 so.” *Smolen, supra*, at 1284 (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993));
12 *see also Reddick, supra*, 157 F.3d at 722 (citing *Bunnell, supra*, 947 F.2d at 343, 346-47).
13 The Court notes that this “clear and convincing” standard recently was reaffirmed by the
14 Ninth Circuit:
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16 Indeed, the cases following *Bunnell* read it as supplementing the “clear
17 and convincing” standard with the requirement that the reasons also must
18 be “specific.” (Internal citation to *Johnson v. Shalala*, 60 F.3d 1428,
19 1433 (9th Cir. 1995)). Our more recent cases have combined the two
20 standards into the now-familiar phrase that an ALJ must provide
21 specific, clear, and convincing reasons. (Internal citation to *Molina v.*
22 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)). There is no conflict in the
23 caselaw, and we reject the government’s argument that *Bunnell* excised
24 the “clear and convincing” requirement. We therefore review the ALJ’s
discrediting of Claimant’s testimony for specific, clear, and convincing
reasons.

1 *Burrell, supra*, 775 F.3d at 1137; *see also Garrison v. Colvin*, 759 F.3d 995, 1015 n.18
2 (9th Cir. 2014) (“The government’s suggestion that we should apply a lesser standard
3 than ‘clear and convincing’ lacks any support in precedent and must be rejected”).

4 As with all of the findings by the ALJ, the specific, clear and convincing reasons
5 also must be supported by substantial evidence in the record as a whole. 42 U.S.C. §
6 405(g); *see also Bayliss, supra*, 427 F.3d at 1214 n.1 (*citing Tidwell, supra*, 161 F.3d at
7 601). That some of the reasons for discrediting a claimant’s testimony should properly be
8 discounted does not render the ALJ’s determination invalid, as long as that determination
9 is supported by substantial evidence. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir.
10 2001).

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12 The ALJ may consider “ordinary techniques of credibility evaluation,” including
13 the claimant’s reputation for truthfulness and inconsistencies in testimony regarding
14 symptoms, and may also consider a claimant’s daily activities, and “unexplained or
15 inadequately explained failure to seek treatment or to follow a prescribed course of
16 treatment.” *Smolen, supra*, 80 F.3d at 1284 (citations omitted).

17 First, the ALJ’s statement that plaintiff’s allegations were not supported by
18 objective evidence in the record is not a convincing reason for discounting plaintiff’s
19 testimony (*see* AR. 19). Although an ALJ may discredit a plaintiff’s testimony when it
20 contradicts evidence in the medical record, *see Johnson, supra*, 60 F.3d at 1434, an ALJ
21 may not discredit a plaintiff’s testimony simply as not supported by objective medical
22 evidence. *Bunnell, supra*, 947 F.2d at 343, 346-47 (*citing Cotton, supra*, 799 F.2d at
23 1407). Furthermore, a claimant’s pain testimony may not be rejected “*solely* because the
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1 degree of pain alleged is not supported by objective medical evidence.” *Orteza v.*
2 *Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995) (quoting *Bunnell, supra*, 947 F.2d at 346-47
3 (*en banc*)) (emphasis added); *see also Rollins v. Massanari*, 261 F.3d 853, 856 (9th
4 Cir.2001); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). The same is true with
5 respect to a claimant’s other subjective complaints. *See Byrnes v. Shalala*, 60 F.3d 639,
6 641-42 (9th Cir. 1995) (finding that while holding in *Bunnell* was couched in terms of
7 subjective complaints of pain, its reasoning extended to claimant’s non-pain complaints
8 as well).

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10 Here, the ALJ began his analysis of plaintiff’s credibility by stating that plaintiff’s
11 allegations “are not fully supported by the objective evidence” (*see* AR. 19). The ALJ
12 then went on to describe several of plaintiff’s visits to the emergency room but never
13 explicitly identified any contradictions between plaintiff’s testimony and the medical
14 evidence (*see* AR. 19-20). The ALJ explains that “alcohol was involved in most
15 instances” of plaintiff visiting the emergency room complaining of knee pain and that
16 several physical examinations revealed good strength in plaintiff’s extremities and
17 normal gait (*see* AR. 19). However, that alcohol was involved does not contradict
18 plaintiff’s allegations of knee pain, and that plaintiff may present with good strength and
19 normal gait at times does not contradict his testimony that he can stand or walk for short
20 periods of time before the pain forces him to stop.

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22 The ALJ also stated that the objective evidence “does not support the degree of
23 knee dysfunction the claimant alleges” and that plaintiff’s allegations “are not fully
24 supported by the report of Donald Ramsthel, M.D.” (*see* AR. 20). However, in his

1 credibility assessment, the ALJ also recognized that plaintiff was diagnosed with bilateral
2 knee pain, most likely arthritis, with reduced range of motion in his knees (*see* AR. 20).
3 That medical evidence does not support the degree of impairment alleged is not a
4 sufficient reason to reject plaintiff's testimony. *See Orteza, supra*, 50 F.3d at 749-50.
5 With no clear contradictions between plaintiff's allegations and the objective medical
6 evidence, the ALJ did not have a legally sufficient reason to discredit plaintiff's
7 testimony.

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9 Also, the ALJ's mention of the record documenting relatively little medical
10 treatment is not a clear and convincing reason supported by substantial evidence for
11 discounting plaintiff's credibility (*see* AR. 19). An "individual's statements may be less
12 credible if the level or frequency of treatment is inconsistent with the level of complaints
13 and there are no good reasons for this failure." Social Security Ruling ("SSR")
14 96-7p 1996 SSR LEXIS 4, at *21-*22. However, "the adjudicator must not draw any
15 inferences about an individual's symptoms and their functional effects from a failure to
16 seek or pursue regular medical treatment without first considering any explanations that
17 the individual may provide, or other information in the case record, that may explain
18 infrequent or irregular medical visits or failure to seek medical treatment." *Id.* at *22; *see*
19 *also Regennitter v. Comm'r SSA*, 166 F.3d 1294, 1296 (9th Cir. 1999) ("Although we
20 have held that 'an unexplained, or inadequately explained failure to seek treatment can
21 cast doubt on the sincerity of a claimant's pain testimony,' we have proscribed the
22 rejection of a claimant's complaint for lack of treatment when the record establishes that
23 the claimant could not afford it") (citations, ellipses and brackets omitted).

1 Here, after mentioning that the record documented little medical treatment, the
2 ALJ went on to list plaintiff's visits to the emergency room and the treatment he sought
3 for numbness in his legs in 2011 and 2013 (*see* AR. 19-20). The ALJ then mentions that
4 plaintiff reported in 2013 not using any therapy for his leg pain and that the record did
5 not indicate plaintiff used any medication other than over-the-counter remedies (*see* AR.
6 20). The case that the ALJ is trying to make regarding plaintiff's credibility in relation to
7 his medical treatment is far from clear. But insofar as the ALJ is claiming that plaintiff
8 did not adequately pursue treatment, this claim is not supported by substantial evidence.
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10 Plaintiff reported having no income other than food stamps and being on a state
11 medical insurance plan, though he did not explain how much of his medical bills are
12 covered under the plan (*see* AR. 33-34). As outlined by the ALJ, plaintiff visited the
13 emergency room, often the only financially feasible treatment available to those without
14 income, when his legs gave out on him (*see* AR. 19-20). Plaintiff also sought treatment
15 on multiple occasions for his leg pain and other complaints (*see* AR. 20, 288-89, 310-16).
16 That plaintiff did not seek additional therapy or prescription medication is not substantial
17 evidence for apathy regarding his impairments, especially considering his lack of income.
18 There is no indication that the ALJ considered possible explanations from the record for a
19 lack of more consistent treatment; therefore, the ALJ erred in discounting plaintiff's
20 credibility for this reason.
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22 Next, the ALJ's statement that plaintiff's allegations were inconsistent with his
23 testimony at the hearing is not convincing and supported by substantial evidence (*see* AR.
24 20). A claimant's reputation for truthfulness and inconsistencies in testimony may be a

1 factor in an ALJ's determination of the claimant's credibility. *See Smolen, supra*, 80 F.3d
2 at 1284.

3 The ALJ in this case found that plaintiff's allegations of knee pain and that his
4 knee condition worsens in cold weather were inconsistent with his testimony at the
5 hearing that he chose to sleep outside rather than in homeless shelters. However, plaintiff
6 explained at the hearing that he spends as little time in the shelter as possible because he
7 cannot be around so many people (*see* AR. 42). That plaintiff's sleeping options are
8 therefore limited when the weather turns cold is far from a convincing reason to discredit
9 his entire testimony regarding his disabling impairments. The ALJ attempts to explain
10 that while plaintiff claims to have difficulty being around people, plaintiff has no
11 diagnosis of any psychological disorder and spends the majority of his day in the library.
12 However, in simply providing an explanation for why he leaves the shelter, plaintiff is
13 not required to have a medical diagnosis. Also, plaintiff's testimony does not give the
14 ALJ any reason to infer that the library is so full of people that plaintiff could not find
15 space to himself; in fact, plaintiff explained at the hearing that he goes to the library
16 during the day right after he explained that he leaves the shelter because there are too
17 many people there (*see* AR. 42). These alleged inconsistencies in plaintiff's testimony are
18 not convincing and supported by substantial evidence.
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20 Finally, the ALJ's statement that the daily activities plaintiff described were
21 inconsistent with his other complaints of disabling symptoms and limitations is not
22 supported by substantial evidence (*see* AR. 21). Regarding activities of daily living, the
23 Ninth Circuit repeatedly has "asserted that the mere fact that a plaintiff has carried on
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1 certain daily activities does not in any way detract from her credibility as to her
2 overall disability.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (*quoting Vertigan v.*
3 *Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)). However, the Ninth Circuit specified “the
4 two grounds for using daily activities to form the basis of an adverse credibility
5 determination: (1) whether or not they contradict the claimant’s other testimony and (2)
6 whether or not the activities of daily living meet “the threshold for transferable work
7 skills.” *Orn, supra*, 495 F.3d at 639 (*citing Fair, supra*, 885 F.2d at 603).

8
9 Here, the ALJ believed plaintiff’s ability to perform self-care activities – namely
10 walking, using public transportation, shopping for food, and reading at the library five or
11 six hours a day – was inconsistent with his allegations of knee pain, providing no further
12 specific analysis (*see* AR. 21). However, staying at the library for most of the day to read
13 in fact supports plaintiff’s testimony that he cannot walk for very long (*see* AR. 38). The
14 other activities listed are daily necessities to survive for a person living alone on the
15 streets, and that plaintiff accomplishes those activities in no way suggests that his
16 allegations of pain that prevent him from being able to work a full day are not credible.
17 *See Reddick, supra*, 157 F.3d at 722 (“[D]isability claimants should not be penalized for
18 attempting to lead normal lives in the face of their limitations.”). Specifically, that
19 plaintiff testified that when he goes out, he travels by walking and using public
20 transportation (*see* AR. 207), without any indication of how far or how long he walks,
21 does not create an inconsistency with his allegations in the same report that his walking is
22 limited because his “knees are like boards” (*see* AR. 211). Therefore, the ALJ provided
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1 no clear and convincing reasons supported by substantial evidence for discounting
2 plaintiff's credibility.

3 The Ninth Circuit has "recognized that harmless error principles apply in the
4 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
5 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
6 Cir. 2006) (collecting cases)). The Ninth Circuit noted that "in each case we look at the
7 record as a whole to determine [if] the error alters the outcome of the case." *Id.* The court
8 also noted that the Ninth Circuit has "adhered to the general principle that an ALJ's error
9 is harmless where it is 'inconsequential to the ultimate nondisability determination.'" *Id.*
10 (quoting *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))
11 (other citations omitted). Here, because the ALJ improperly rejected plaintiff's testimony
12 in forming the RFC and plaintiff was found to be capable of performing work based on
13 that RFC, the error affected the ultimate disability determination and is not harmless.

15 The Court may remand this case "either for additional evidence and findings or to
16 award benefits." *Smolen, supra*, 80 F.3d at 1292. Generally, when the Court reverses an
17 ALJ's decision, "the proper course, except in rare circumstances, is to remand to the
18 agency for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587,
19 595 (9th Cir. 2004) (citations omitted). Thus, it is "the unusual case in which it is clear
20 from the record that the claimant is unable to perform gainful employment in the national
21 economy," and that "remand for an immediate award of benefits is appropriate." *Id.*
22 Here, the outstanding issue is whether or not a vocational expert may still find an ability
23 to perform other jobs existing in significant numbers in the national economy despite
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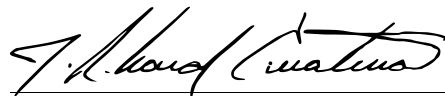
1 additional limitations. Accordingly, remand for further consideration is warranted in this
2 matter.

3 CONCLUSION

4 Based on these reasons and the relevant record, the Court **ORDERS** that this
5 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
6 405(g) to the Acting Commissioner for further consideration consistent with this order.

7 **JUDGMENT** is for plaintiff and the case should be closed.

8 Dated this 20th day of July, 2015.

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11 J. Richard Creatura
12 United States Magistrate Judge
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